JOHORE REPORTS.

[APPELLATE JURISDICTION]

LAVILLE, J.

July 23, 1940.

KEE AH LOW

vs.

THE PUBLIC PROSECUTOR, JOHORE

[JOHORE BAHRU CRIMINAL APPEAL No. 11 of 1940]

Common Gaming House—Entry by Police—Form of Search Warrant—Conditions precedent.

The presumption created by Section 17 of the Common Gaming Houses Enactment cannot arise against a house or the occupier thereof unless the entry into the premises is made in strict accordance with either Section 14 or Section 16 of the Enactment. If a Search Warrant is to be used as evidence of a legal entry under the Enactment, it must not only show that it is issued under Section 14 (i), but it must also recite that every condition required by Section 14 (i) has been fulfilled. Failing this, it must be proved **aliunde** that the Search Warrant, though irregular in Form, was issued in compliance with the said conditions.

MAGISTRATE'S APPEAL.

The point of law decided was raised neither at the trial nor in the appeal. The facts and the questions of law out of which the appeal arose, and the arguments advanced by counsel, are therefore immaterial to this report.

Braga for Appellant.

Ismail, D.P.P. for Respondent.

Cur. Adv. Vult.

Laville, J.—Appellant was convicted on 20.3.40 on the charge that he about 5 p.m. at No. 172 Jalan Ngee Heng, Johore Bahru did use the said premises of which he was the occupier as a common gaming house contrary to section 4 (i) (a) of Enactment No. 37 (Common Gaming Houses).

The section 4 (i) (a) reads:—

> "Whoever being the owner or occupier, or having the use temporarily or otherwise thereof, keeps or uses a place as a common gaming house shall be punishable with a fine not exceeding $3,000 or with imprisonment of either description for a period not exceeding 12 months."

A common gaming house by virtue of section 2 (i) includes any place kept or used for the purpose of a public lottery.

A lottery is by the same section defined as including any game method or device by which money or moneys worth is distributed or allotted in any manner dependant on chance....., and a public lottery means a lottery to which the public or any class thereof has or may have access.

A presumption is laid down that every lottery is a public lottery until contrary be proved.

It is also laid down by section 2 that the words instruments or appliances for gaming includes, *inter alia,* all articles which are used in or for the purpose of, a lottery.

Section 17 of the Enactment creates the following three presumptions in certain circumstances in regard to a place.

(1) that it is a common gaming house
(2) that it is so kept or used
(3) that the occupier so keeps or uses it.

The circumstances which raise the above presumptions are any one or more of the following provided the place has been entered under the provisions of the Enactment.

(a) that instruments or appliances for gaming are found in the place or on any person found therein
(b) that persons are seen or heard to escape therefrom on approach or entry of a Magistrate or a Senior Police Officer
(c) that a police officer or any person having authority under the enactment to enter or go to such a place is prevented, obstructed or delayed in entering or approaching such place or any part thereof.

Any one of these circumstances raise all three of the presumptions cited above simultaneously, but each presumption can be rebutted by proof to the contrary.

The evidence in this case is that on 29th. November, 1939 Mr. N. C. Halsey, an Assistant Commissioner of Police entered the premises No. 172 Jalan Ngee Heng by virtue of a warrant issued to him by Wan Mohamed bin Uda A.C.P., accompanied by a party of 3 other police officers consisting of 2 constables and Wan Mohammed bin Uda A.C.P. who has been gazetted a Senior Police Officer for the purposes of this Enactment. The warrant states that on information laid before the A.C.P. of the commission of the offence of public gaming house it appears to him necessary that the production of certain articles is essential to an enquiry now in being into the said offence. It goes on to authorise Mr. Halsey within the space of 3 days to search for the said articles in

No. 172 Jalan Ngee Heng belonging to Kee Ah Low, and if found to produce them before the Magistrates Court. The warrant is returnable immediately on execution. A schedule sets out the articles to be sought for as 'all money and exhibits regarding offence of Public Gaming House or Chap Jee Kee'.

There is nothing on the warrant to show it was issued under the provisions of section 14 of Enactment No. 37 or by a Magistrate or Senior Police Officer, nor is it apparent that it was issued on written information on oath as required by the provisions of section 14 of the Enactment, nor does it authorise the person executing the warrant to employ assistance or force in its execution.

The form of the warrant is that given in Form VIII of the Second Schedule of the Criminal Procedure Code under the heading of Warrant to search after Information of a Particular Offence and appears to be appropriate to Chap. VI of that Code.

In order that the circumstances set out in section 17 of the Enactment should raise the presumptions mentioned therein, it is essential that the place should be entered under the Enactment. Sections 14 and 16 lay down the method of entry under the Enactment. Section 14 gives right of entry on the authority of a warrant issued by Magistrate or a Senior Police Officer after written information on oath and such enquiry as may be deemed necessary, for the purpose of search and seizure of gamming instruments and appliances, money and other articles for gaming and for detention of all persons therein till completion of search. Section 16 gives power to a Magistrate or Senior Police Officer to do what they may authorise a police officer to do under section 14.

The Common Gaming Houses Enactment is highly penal and interferes with the liberty of the subject: gaming, lotteries and betting are not repugnant to the Common Law of England and are not *mala per se*: by this enactment however certain methods of enjoying such pastimes have been made a crime, and what is more in certain circumstances the basic principle of justice adopted from English law by this country that a man is innocent till he is proved guilty by the prosecution is abrogated, and the onus is thrown on the accused to prove his innocence. It follows that such enactment should be construed very strictly by the Court, and that where the enactment is ambiguous or where the circumstances do not fit the exact terms of the enactment the accused should be given the benefit. It also follows that the prosecution must prove exactly and strictly that the circumstances which by law throw the onus of proof on the accused by raising legal presumptions in favour of prosecution do in fact exist.

In this case now under appeal it is clear from the evidence given before the learned Magistrate that the prosecution relied on the presumptions raised by section 17, and the Magistrate has held that the presumptions properly arose and were not rebutted by the appellant, but not enought consideration appears to have been given to the question as to whether there was any satisfactory evidence that the primary condition under which the presumptions in section 17 arise had been proved. That condition is that the place, i.e., No. 172 Jalan Ngee Heng had been entered under the Common Gaming Houses Enactment.

The evidence on this point was the production of a Search Warrant Ex. Pl by Mr. N. C. Halsey in whose name it was made out. It is clear from the evidence of Mr. Halsey that it was in execution of this warrant he entered 172 Jalan Ngee Heng, and from the evidence of Wan Mohamad bin Uda and the warrant that he Mr. Halsey was conducting and in charge of the search. There is no evidence that Mr. Halsey is a Senior Police Officer under the enactment or was acting under the provisions of section 16 of the Enactment and the warrant is evidence that he was not so acting.

On inspection of the warrant Ex: Pl there is nothing to show on the face of it that it was issued under the provisions of section 14 of the Common Gaming Houses Enactment. It is in form a warrant issued under the provisions of Chap. VI of the Criminal Procedure as shown in Form VIII of Schedule 2 of that Code. It is on the face of it issued by an officer without the requisite authority to issue such a warrant, nor does the issuing officer designate himself thereon as a Senior Police Officer and finally it does not set forth that it was issued after the preliminaries required by section 14 of the Enactment were complied with. Ex: Pl states that an information has been laid: the provisions of section 14 require that it should be a written information on oath. Ex: Pl states that specified articles required for an enquiry into an already particularized offence are to be the object of the search: the provisions of section 14 require that entry and search be made generally for evidence of gaming. Ex: Pl authorises only Mr. Halsey to search: the provisions of section 14 allow for such

assistance as may be necessary. *Prima facie* Ex: P1 therefore is a warrant under the Criminal Procedure Code issued by a person not authorised to issue it, and not a warrant issued under the Common Gaming Houses Enactment. In order to show that it was in fact so issued there is need of evidence by the issuing officer that it was issued after written information on oath and that he was authorised to issue such a warrant and that he authorised the officer in whose name it was issued to employ such assistance as was necessary. No such evidence is produced in this case, though Wan Mohamad does state in his evidence that he is a Senior Police Officer. At page 44 of *Braddell* on Common Gaming Houses the conclusion is drawn after discussion of cases affecting the point that there must be proof that there was legal entry under the Enactment and that resort cannot be had to the sections of the Criminal Procedure Code which deal with arrest and search warrants.

The question remains whether the presence of Wan Mohamed bin Uda, a Senior Police Officer, at the forced entry and search made the entry a legal entry under the Enactment. In my opinion the answer to this is in the negative. The issue of a warrant to another police officer purporting to authorise him to enter and search precludes the idea that Wan Mohamed was in person supplying the absence of a warrant under section 16. Even if he was so acting there must be evidence led to show that he was acting on written information on oath, and there is no such evidence. There is also evidence of Wan Mohamed himself that Mr. Halsey was conducting the party. For these reasons I can only conclude that the entry was not made under the authority given by section 16 in that though Wan Mohamed was a Senior Police Officer under the Enactment he was not acting in that capacity during the entry and search.

I hold therefore that the prosecution have not proved that entry was made into 172 Jalan Ngee Heng under the Common Gaming Houses Enactment.

The result is that none of the presumptions arising under section 17 are available for the prosecution.

As to extrinsic evidence that the place was so used or kept by the occupier on the date in question there is practically none: certain documents to do with a chap jee kee lottery were found in the place, but there is nothing to show that they had any connection with the house or the occupier or with a lottery being conducted or which had been or was to be conducted in the house by the occupier and cannot, without the presumption section 17, be taken to be strong enough evidence against the appellant to warrant a conviction.

There appears to be no form of warrant in existence in Johore applicable to section 14 of the Common Gaming Houses Enactment and until this is remedied a warrant under section 14 should set out that it is under such section, that the information on which it is issued is a written one given on oath and should contain the other provisions set forth in the section: till this is done it will be necessary in each case to prove the circumstances in which each warrant is issued. The warrant now in use is one under the Criminal Procedure Code and not applicable to section 14 of the Enactment.

In conclusion, for the reasons set out above I find there is no proof that the entry and search of 172 Jalan Ngee Heng was made under the Common Gaming Houses Enactment and that therefore none of the presumptions under section 17 arise in favour of the prosecution. I find also there is not sufficient evidence apart from these presumptions to warrant a conviction on the charge.

For these reasons I set aside the conviction and sentence and allow the appeal. The fine of $1000 will be refunded and any articles forfeited under section 14 (ii) will be returned to the appellant.

Appeal allowed.